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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 615

RALPH BERGER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF OF AMICI CURIAE HENRY HABEL, ARTHUR McGOVERN, KENNETH BURKARD, JULIO RODRIGUEZ and MORGAN SEIFERT, ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Interest of Amici

This brief is filed in support of the petition for certiorari upon the consent of the parties.

Amici are five individuals who were convicted of conspiracy to violate New York Penal Law § 555. Their prosecution, like that of petitioner, was based upon eavesdropping conducted pursuant to § 813-a of the New York Code of Criminal Procedure. Appeals by *amici* were argued before the New York Court of Appeals at the same time as petitioner's and that court affirmed both petitioner's and *amici's* convictions the same day. The facts relating to eavesdropping in both cases are strikingly similar in

terms of the affidavits submitted to procure the eavesdropping orders and the orders themselves. Like petitioner, *amici* moved unsuccessfully to suppress the evidence so obtained.

While petitioner proceeded to trial, *amici*, after denial of their motion to suppress, and relying on § 813-c of the Code of Criminal Procedure, pleaded guilty and appealed.

The Appellate Division dismissed the appeals of *amici* and the New York Court of Appeals affirmed, 18 N. Y. 2d 148. *Amici* filed notices of appeal to this Court on October 3, 1966, and it is anticipated that jurisdictional statements will be filed on or before December 2, 1966. Thus the instant case is likely to be first considered by this Court. Because *amici* will be directly affected by the disposition of this case, and because serious constitutional issues are raised, *amici* urge that the petition for certiorari be granted so that the New York statute authorizing eavesdropping may be fully reviewed.

Reasons for Granting Writ

The New York statute, § 813-a of the Penal Law, permits eavesdropping upon *ex parte* orders to be entered by certain judges on an affidavit of a specified prosecutor or police officer "that there is reasonable ground to believe that evidence of crime may be thus obtained."

The original eavesdrop order in this case is supported by an affidavit completely silent on the source of the deponent's knowledge of the facts alleged. The order entered permitted the overheard and recording of all conversations, without limitation, which might take place at the subject premises.

1. It is now clear that eavesdropping, accomplished by means of a physical trespass, violates the Fourth Amendment, *Silverman v. United States*, 356 U. S. 505, and where

done by state officials, violates the Fourteenth Amendment guarantee of due process, *Clinton v. Virginia*, 377 U. S. 158; cf. *Ker v. California*, 374 U. S. 23.

Therefore, like any search warrant, an eavesdropping order must be based upon a showing of probable cause sufficient to pass the accepted constitutional test as enunciated in such cases as *Aquilar v. Texas*, 378 U. S. 108, 114. By affirming the conviction below, the New York Court of Appeals has adopted a construction of the New York statute which requires only a conclusory recital of the deponent's opinion, with no substantiation of the facts or the source of knowledge of them.

2. The Fourth Amendment requires that a search warrant "particularly [describe] the * * * things to be seized". It is difficult to imagine a description less particularized than "any and all conversations" which occur in a designated office over a substantial period of time. The New York Court of Appeals has thus interpreted the statute to permit general searches, contrary to the constitutional limitations set forth in *Stanford v. Texas*, 379 U. S. 476, and *Marion v. United States*, 375 U. S. 192, 196.

It is, of course, inherent in the nature of eavesdropping of the sort authorized by the orders in this case that there is no selectivity. The eavesdropper necessarily overhears everything, whether innocent or criminal. He overhears privileged communications, and conversations between persons having nothing to do with the investigation. Even if intended to be limited to specific conversations between identified persons, the process requires extensive monitoring unless conducted by a party to the communication, for a tape recorder can not discriminate and identify.

3. The New York statute, by its terms, permits eavesdropping to secure "evidence of crime", and the orders in this case were issued under its authority expressly

for that purpose. But a search for mere evidence violates the Fourth Amendment. The constitution permits searches only for "the instrumentalities and means by which a crime is committed, the fruits of a crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime." *Harris v. United States*, 331 U. S. 145, 154. See also *Boyd v. United States*, 116 U. S. 616.

4. Eavesdropping, as sanctioned by the New York statute, almost inevitably results in self-incrimination if it effectively performs its function. Where the subject is unaware of the eavesdropping, it can only be considered violative of the Fifth Amendment. Testimony which a witness or defendant cannot be compelled to give before a grand jury or at trial is not purified where it is obtained surreptitiously. Confessions are involuntary when "the methods used to extract them offend an underlying principle in the enforcement of our criminal law." *Rogers v. Richmond*, 365 U. S. 534, 541.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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